

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

| | | |
|------------------------|---|------------------------|
| J & L FARMS, |) | |
| |) | Case No. 78-CE-167-SAL |
| Respondent, |) | |
| |) | |
| and |) | |
| |) | 6 ALRB No. 43 |
| FILIBERTO CHAVEZ and |) | |
| NARCISO CANALES, |) | |
| Individuals, |) | |
| |) | |
| Charging Party, |) | |
| |) | |
| and |) | |
| |) | |
| UNITED FARM WORKERS OF |) | |
| AMERICA, AFL-CIO, |) | |
| |) | |
| Intervenor. |) | |
| |) | |

DECISION AND ORDER

On January 21, 1980, Administrative Law Officer (ALO) Robert LeProhn issued the attached Decision and recommended Order in this proceeding. Thereafter Respondent and Charging Party each timely filed exceptions with a supporting brief.

Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural

Labor Relations Board (ALRB) hereby orders that Respondent J & L Farms, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Laying off or otherwise discriminating against agricultural employees because of their union membership, union activities, or association with union agents.

(b) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of their rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

2. Take the following affirmative actions, which are deemed necessary to effectuate the policies of the Act:

(a) Offer Narciso Canales and Filiberto Chavez full reinstatement to their former positions or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Reimburse Narciso Canales and Filiberto Chavez for all wage losses and other economic losses they have suffered as a result of their layoff. Loss of pay is to be determined by multiplying the number of days the employee was out of work by the amount the employee would have earned per day. If on any day the employee was employed elsewhere, the net earnings of that day shall be subtracted from the amount the employee would have earned at J & L Farms for that day only. The award shall reflect any wage increase, increase in work hours, or bonus given by Respondent since the discharge. Interest shall be computed at the rate of 7 percent per annum.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the provisions of this Order.

(d) Sign the Notice to Employees attached hereto. After its translation by a Board agent into Spanish and any other appropriate language(s), Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice at conspicuous places on its premises, the places of posting to be determined by the Regional Director. The Notices shall remain posted for 60 consecutive days at each location. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(f) Mail copies of the attached Notice in Spanish and any other appropriate language(s) within 30 days after the date of issuance of this Order, to all employees employed at any time from June 26 through July 1978 and during March 1979.

(g) Arrange for a representative of Respondent or a Board agent to read the attached Notice in Spanish and any other appropriate language(s) to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent shall be given the

opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: August 12, 1980

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

MEMBER MCCARTHY, Dissenting in Part:

I agree that it is wrongful for an employer to consider the union activities of employees in determining employment status even where, as here, there is ample economic justification for layoffs due to seasonal fluctuations in work force requirements. But I cannot find an unlawful motive for Respondent's layoff of Narciso Canales absent a showing of knowledge of his union activity by direct or circumstantial evidence. Accordingly, I would dismiss the complaint insofar as it relates to Canales.

An employer may lay off employees for any reason provided no discrimination or anti-union bias is involved. NLRB v. Century Broadcasting Corp. (8th Cir. 1969) 419 F.2d 771 [73 LRRM 2414]. Thus, a layoff cannot be held to be discriminatory without a showing that the employer had knowledge of the employee's union activity. NLRB v. Ace Comb Co. (8th Cir. 1965) 342 F.2d 841 [58 LRRM 2732].^{1/} Furthermore, the requisite burden of proof is on the

^{1/} An exception to this rule is where the General Counsel proves that the employer acted on a suspicion or belief that the employee was engaging in union activities, notwithstanding the absence of actual participation. See NLRB v. Clinton Packing Co., Inc. (8th Cir. 1972) 468 F.2d 953 [[81 LRRM 2733]].

General Counsel to establish such knowledge. Siltec Corp. (1975) 217 NLRB 282 [89 LRRM 1514]. The record herein contains no evidence that Respondent had knowledge, when it laid off Canales on December 22, 1978, that he had previously attempted to organize its employees.

No reasonable inference of Respondent's knowledge can be drawn from Canales' statement that he signed an authorization card in the general vicinity of two supervisors absent evidence that the supervisors observed the act and, if they did, that they understood its purpose. The majority's reliance on the testimony of employee Filiberto Chavez, to the effect that Canales supported his efforts to interest employees in a representation election, to establish Respondent's knowledge, does not stand up to scrutiny. Nor does the fact that supervisor Ayala heard contemporaneous rumors that Chavez was a UFW organizer or supporter. Chavez' union activity was, at most, minimal. As the ALO observed, "[T]he credited testimony [of Chavez and Canales] does not establish a highly visible pattern of union or protected activity." As for Ayala, he neither implicated Canales nor reported the rumors to the company principals responsible for directing the layoffs. Even assuming that Ayala had understood the rumors to mean that Canales also was engaged in organizing activity, such knowledge should not be mechanically imputed to the discharging supervisor. See Delchamps, Inc. v. NLRB (5th Cir. 1978) 585 F.2d 91 [99 LRRM 3386] and cases cited therein.

Significantly, other employees were also laid off along with Canales, two of whom did not sign authorization cards or

otherwise engage in protected activity. Conversely, two employees were retained even though they had signed authorizations at the same time as did Canales.^{2/}

In sum, therefore, the record will not support a finding that Respondent had knowledge that Canales was engaged in union activities, nor will it support a finding that Canales was laid off because Respondent believed or suspected that Canales was involved in such activities. Moreover, no anti-union animus on Respondent's part was demonstrated.

I would find that the situation presented in the instant case falls within the ambit of the doctrine of John J. Elmore (Jan. 25, 1980) 6 ALRB No. 7. In that case, the Board held that an employer is free to create seniority rights in any manner he pleases so long as they are not discriminatory. In the instant case, I find no evidence that the criteria utilized by Respondent in selecting Canales for layoff status were discriminatory or that Respondent had a seniority policy whereby employees lost seniority rights due to a break in service.

Dated: August 12, 1980

JOHN P. McCARTHY, Member

^{2/} The ALO found that of the 13 tractor drivers in Respondent's employ during the time relevant herein, five, including Canales, were laid off on the same date. It would appear therefore that eight drivers were retained. However, three drivers were not working when the layoffs were directed as they had taken their annual leave and were not scheduled to return until the following March or April.

NOTICE TO EMPLOYEES

After a trial in which each side had an opportunity to present its facts, the Agricultural Labor Relations Board has found that we violated the law by laying off two-of our employees because of their union activities.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law of the State of California which gives farm workers these rights:

1. To organize themselves.
2. To form, join, or help unions.
3. To choose, by secret ballot election, a union to represent them in bargaining with their employer.
4. To act together with other workers to try to get a contract or to help and protect one another.
5. To decide not to do any of these things.

Because this is true, we promise that:

WE WILL NOT do anything in the future that forces you to do, or prevents you from doing, any of the things listed above.

Especially:

WE WILL NOT discharge, lay off, or otherwise discriminate against any employee because of his or her union activity, union sympathies, or association with union agents.

The Agricultural Labor Relations Board has found that we discriminated against Narciso Canales and Filiberto Chavez by discharging them because of their union activities. We will reinstate them to their former jobs and reimburse them for any loss of pay and other economic losses, plus 7% interest per annum, they suffered as a result of their discharge.

Dated:

J & L FARMS

By:

(Representative)

(Title)

This is an official document of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

J & L FARMS (UFW)

6 ALRB No. 43

Case No. 78-CE-167-SAL

ALO DECISION

The ALO concluded that Respondent violated Labor Code section 1153 (c) and (a) by discriminatorily laying off employees Filiberto Chavez and Narciso Canales. The ALO found that Chavez and Canales had actively encouraged other employees to sign authorization cards, and that this activity was observed by various supervisors. Respondent asserted that the layoff was necessitated by the end of the harvest and that Chavez and Canales were selected for layoff based primarily on their lack of seniority. On closer scrutiny of certain work applications, however, it appeared that the alleged discriminatees had more seniority than two employees who were retained. The business justification was therefore rejected and a discriminatory motive found. The ALO concluded that the Act had been violated and recommended that both employees be reinstated with back pay.

The ALO dismissed that part of the complaint which alleged discriminatory failure to rehire Chavez and Canales after the layoff. The record indicated that no tractor drivers were hired in that period because Respondents needed less labor.

BOARD DECISION

The Board adopted the findings, conclusions, and recommendations of the ALO, except that the method of computation of the back-pay award shall be on a daily basis, not the quarterly formula in F. W. Woolworth Co. (1950) 90 NLRB 289 [26 LRRM 1185].

DISSENT

Member McCarthy concurs as regards Filiberto Chavez, but finds that the evidence does not show Respondent knew of Narciso Canales' union activity.

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD

| | | |
|---|---|----------------------|
| J & L FARMS |) | |
| |) | |
| Respondent |) | |
| |) | |
| and |) | Case No. 78-CE-167-M |
| |) | |
| FILIBERTO CHAVEZ, NARCISO CANALES, and |) | |
| UNITED FARM WORKERS OF AMERICA, AFL-CIO |) | |
| |) | |
| |) | |
| |) | |
| |) | |
| Charging Parties |) | |
| |) | |

APPEARANCES:

Arnold B. Myers, Esquire
Abramson, Church & Stave
Crocker Bank Building, Third Floor
Salinas, California
On Behalf of Respondent

Norman K. Sato, Esquire
112 Boronda Road
Salinas, California
On Behalf of the General Counsel

DECISION

STATEMENT OF THE CASE

Robert LeProhn, Administrative Law Officer: This case was heard, before me in King City and Salinas, California, on March 13, 26 and 27, 1979. Complaint issued February 1, 1978, on 13 charges filed against Respondent. During the interval between March 13 and March 26, the parties entered into a formal Settlement Agreement on all charges covered by the complaint except Case No. 78-CE-167-M in which an Amended Complaint^{1/} issued on March 20, 1979, charging Respondent with violating Sections 1153(a) and (c) of the Agricultural Labor Relations Act (Act) by terminating Filiberto Chavez and. Narciso Canales on or

^{1/}Hereinafter referred to as "complaint."

about December 23, 1978. During the course of the hearing the General Counsel was permitted, to amend, the complaint to allege that Respondent further violated, the Act by refusing to rehire Chavez and Canales. The charge and the amended complaint were duly served, upon Respondent.

The United Farm Workers of America (UFW) a Charging Party, moved to intervene in the proceedings. The motion was granted.

All parties were given full opportunity to participate in the hearing. The General Counsel and. the Respondent filed post-hearing briefs.

Upon the entire record, including my observation of the demeanor of the witnesses and. after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

J & L Farms is a partnership engaged in agriculture in Monterey County, California, and is an agricultural employer within the meaning of Section 1140 (c) of the Act.

The UFW is an organization in which agricultural employees participate. It represents those employees for purposes of collective bargaining, and it deals with agricultural employers concerning grievances, wages, hours of employment and conditions of work for agricultural employees. The UFW is a labor organization within the meaning of Section 11M-0 (f) of the Act.

II. The Employer's Operations

J & L Farms is a partnership. Wilfred B. Lindley and Phil Johnson are its partners. J & L is engaged in row-crop farming and vineyard management. Lindley is responsible for field operations, including supervising the tractor drivers. Johnson is General Manager and is in charge of the partnership's office and its records. Luis Ayala was the tractor foreman and immediate supervisor of the tractor drivers during the period Chavez and Canales were employed by Respondent. He is admitted to be a supervisor within the meaning of Labor Code Section 1140.4 (j).

J & L has been operating for five years; 1978 was the first year in which it was engaged in vineyard management on a major scale.^{2/} On February 1, 1978, the partnership acquired management of 2,200 acres of varietal grapes in the Gonzales area. The new operation made it necessary to hire additional employees.

About November 21, 1978, J & L began management of Poloma Vineyard located in Soledad. Victor Martinez had been employed as

^{2/}Prior to February 1, 1978, J & L rented 800 acres of vineyard land from July through the harvest period. Johnson managed a small vineyard since 1973.

Poloma's tractor foreman. Because J & L needed an additional tractor foreman to handle Poloma, Martinez was hired, about December 1. Since work requirements at Poloma were minimal at the time, Martinez was assigned to drive a tractor for the balance of the harvest. He subsequently began supervising tractor drivers at Poloma.

With the acquisition of Poloma, J & L also employed Domingo Sepulveda to continue as irrigation foreman on the property. He too drove a tractor during the harvest. As of the hearing date, Sepulveda was doing repair and maintenance work in anticipation of the irrigation season.

J & L employs individuals who work as crew foremen during part of the year and drive tractors for part of the year. Juan Sanchez was foreman of a repair and maintenance crew prior to the harvest. He was moved to tractor driver during the harvest and at the time of hearing was still driving tractor. Sanchez is an experienced tractor driver and has driven a mechanical harvester. Lindley testified that the addition of a second crew, with Sanchez as its foreman, was contemplated with the advent of the budding season.^{3/}

In addition to its supervisors, J & L employs general labor and tractor drivers. Tractor work begins in the spring as soon as the weather allows and continues until the completion of the harvest. Vine spraying with sulfur begins in March and continues until the harvest begins around the end of September. The peak spraying period is mid-May.

J & L's grapes are machine harvested. Tractor drivers are used on the harvesting machines and to pull gondolas into which the harvested grapes are dumped. When the gondolas are full, the grapes are dumped into a set of doubles and transported to a winery.

From time to time during the spraying season, tractors are not required for a day or two. On such occasions, rather than subject the drivers to a layoff and run the risk of losing them for the harvest season, J & L's practice is to assign them to field work at no reduction in pay.

During the harvest season there are also occasions when there may be no tractor work for a day or two. Contrary to the summer practice, drivers are not transferred to another type work. Lindley testified that drivers do not like being moved to other types of work because of the \$.55 per hour wage differential and because it is regarded as a step down. Lindley testified that he would not temporarily move a tractor driver into pruning work, and while he did not recall a conversation with Narciso Canales in which he declined to move Canales to pruning, he conceded that had he been asked regarding such a move, he would not have agreed. No explanation was offered regarding why Respondent did not follow its non-harvest time practice of maintaining the driver's wage rate if he were temporarily assigned to nondriving

^{3/} Sanchez' wage rate is the same whether he is driving tractor or running a crew.

work.

III. The Terminations

Filiberto Chavez has worked as an agricultural laborer in both the United States and Mexico. He is an experienced tractor and truck driver. Chavez was initially employed by Respondent March 27, 1978, as a tractor driver. Until about the end of September he was engaged in sulfur spraying. When the harvest began, he was assigned to drive a harvesting machine. He worked at this until about the middle of October when he was assigned to pulling gondolas. He continued at this job until terminated on December 22, 1978.

Narciso Canales was hired on March 17, 1978, to perform general tractor work. During the period of his employment, he did basically the same work as Chavez.

During July or August, 1978, Lindley told Canales an insurance plan was available for him and that his family could be covered if Canales paid the cost. Canales declined family coverage, telling Lindley he could not afford it. On an occasion in December Canales and others were offered coverage at no personal cost. The coverage was to be effective January 1, 1979, if the enrollment cards were promptly returned.

Chavez testified that about December 1 Lindley brought him a card and told him if he returned it the following day, his family would have insurance coverage beginning January 1.

Although Lindley testified, he offered no testimony regarding J & L's employee insurance coverage and did not controvert the testimony of his conversations with Chavez and Canales.

No evidence was presented regarding the eligibility requirements for plan coverage. However, such plans generally predicate eligibility for coverage upon active employment for a covered employee. It is reasonable to infer from Lindley's invitation to register for coverage that the layoff of Canales and Chavez was not contemplated as of early December.

Canales, Chavez and three other drivers were terminated at the close of work on December 22.^{4/} It was pay day and the drivers, as was their custom, came by the office for their checks. Speaking through the translation of Steve Alderete, J & L's viticulture supervisor, Lindley told the drivers that the work was finished in grape harvesting, that tractor driving was over for a while and that if any of them could get another job for the time being, he should take it. Chavez asked if he could have a letter to take to the unemployment office so that he could draw unemployment benefits. Lindley told him to apply for benefits and that when the unemployment office contacted

^{4/} Tony Olivas, Ismael Alvarez and Ron Grant none had returned to work at J & L as of the time of hearing.

him, he would file the proper papers.^{5/}

Yslas and Manuel Sanchez, who were also present, were told by Lindley that the layoff did not apply to them. They were retained, testified. Lindley, because he had work for them. The criteria used to determine who should be laid off were, according to, Lindley, as follows: the length of time a driver had worked for J & L,^{6/} the quality of his work and his dependability. Johnson testified that one consideration with respect to retaining Manuel Lopez, Anacleto Reyes and Rodrigo Reyes was the fact that each had worked for Johnson's father. Lindley and Johnson jointly determined who was to be laid off. They did not consult with Ayala or seek his views.

IV. Employment History Of Tractor Drivers

Manuel Lopez: Respondent lists Lopez' date of hire as April 3, 1975. In 1975 he worked 70 hours during the pay period ending April 3 and did not work again until the period ending November 11, 1975. Thereafter he worked through the period ending November 24. He had no further employment until the May 1, 1976, pay period. His only other work during 1976 was during the period ending June 27, 1976. There is no evidence he worked during 1977.

In 1978 Lopez worked two unconnected periods in August, the last ending August 20. He next worked what appears to be one day in the period ending October 1. His last work in 1978 was in the October 29 pay period. Lindley testified that Lopez was on leave of absence in Texas with his family and was expected to return to work about April 1, 1979. He testified that it was Lopez' practice "in past years" to take such annual leaves.^{7/}

Dan Johnson: Respondent lists Johnson's date of hire as April 5, 1975. He was working for J & L as of the time of hearing. Johnson worked 37 hours during the pay period ending April 5, 1975, and did not work again until the August 28 pay period, during which he worked 53% hours. Thereafter, he worked 122% hours during the period ending October 17, making a total of 213 hours worked during a six and one-half month period.

There is no evidence Johnson worked for Respondent at any time during 1976 or 1977.

He returned to work in December, 1978, during the pay period in which Chavez, Canales and others were laid off. When Johnson

^{5/}Alderete's testimony on this point is corroborated by Chavez.

^{6/}No seniority list was prepared or made known to the drivers at the time of the layoffs. Ayala, the tractor supervisor, testified he had never seen such a list prior to the hearing.

^{7/}The J & L records in evidence do not show why Lopez ceased work at the end of October.

returned in 1978, he was required to fill out an employment application. It is dated December 1. Lindley testified the reason for the application was the change in the scope of Respondent's operations. Subsequent to the December 22 terminations, Johnson continued to work through January, February and March.

Anacleto Reyes: Respondent lists Reyes' date of hire as November 26, 1975.

In 1975, Reyes worked a total of 40 hours for Respondent. There is no evidence of employment by Respondent during 1976 or 1977.

Reyes returned to work during the pay period ending July 9, 1978, having filed an application dated June 25. His work pattern for the balance of 1978 is approximately the same as that of Chavez and Canales. Subsequent to the layoffs he continued to work and was employed at the time of hearing as a row crop tractor driver. Reyes worked for Phil Johnson's father for some years prior to working for J & L.

Doug Little: Respondent lists Little's date of hire as August 23, 1976. During 1976 Little worked two pay periods in August. He did not work again until the October 30. He did not work during the balance of 1976, and there is no evidence he worked for Respondent in 1977.

In 1978, Little began work during the period ending July 9 and worked through September 17. He did not return to work until the November 5 pay period, during which he worked 18 hours. Thereafter, he did not work until the December 24 pay period. He continued to work thereafter.

Rodrigo Reyes: Respondent lists R. Reyes' date of hire as January 30, 1977. He is currently employed, having returned from a leave of absence on March 3, 1979. Reyes' gross earnings from Respondent in 1977 were \$155.10. This sum was earned for work performed during pay periods ending January 30, 1977, and February 16, 1977.

In 1978, R. Reyes returned to work during the pay period ending July 9. His application lists his date of hire as June 12, 1978. After beginning work, his work pattern through the November 26 pay period approximates that of Chavez and Canales. It does not appear that he worked during the month of December, 1978.

Reyes had in years past worked as an agricultural laborer for Phil Johnson's father. Johnson testified credibly that Reyes' previous employment by his father was a factor which he considered in determining which tractor drivers were to be laid off on December 22. Similar service by M. Lopez and Anacleto Reyes was a consideration which led to their retention after the December layoffs.

Ron Grant: Respondent lists Grant's date of hire as July 21, 1977. He was among those terminated on December 22, 1978. During 1977, Grant worked only during the pay period in which he was hired and

earned \$185.50. His Earnings Record for the third and fourth quarters of 1978 shows his return to work during the period ending July 9, 1978. From that point until his termination on December 22, he worked the same pay periods as Canales and Chavez.

Angel Muniz: Muniz' date of hire is listed as February 15, 1978. He took a leave of absence December 1 and returned to work on March 3, 1979. He is currently employed as a tractor driver. Muniz worked regularly from February 15 through December 1.

Guadalupe Yslas: Yslas' date of hire is listed as March 17, 1978. He was not terminated on December 22 and continued, to work until his injury in a traffic accident on or about February 4, 1979. He was expected to be able to return to work about April 1, 1979. Aside from the fact Yslas was not laid off, his work pattern for the third and fourth quarters of 1978 was the same as that of Chavez and Canales.

Manuel Sanchez: Respondent lists March 17, 1978, as Sanchez' date of hire. He was not terminated on December 22 and was employed by Respondent as of the date of hearing. During 1978 his work pattern was the same as that of Canales and Chavez.

Narciso Canales: Canales' date of hire was March 17, 1978. He was terminated December 22. During his period of employment he worked during the same periods for approximately the same number of hours as Yslas and Sanchez who were employed on the same day as he.

Filiberto Chavez: Chavez was employed on March 27, 1978, and terminated December 22. During the period of his employment his work pattern approximated that of Yslas and other drivers employed on March 17.

Ismael Alvarez: Alvarez first worked for Respondent during the period ending October 1, 1978. He was terminated December 22 and has not returned to work.

Tony Olivas: Olivas first worked during the pay period ending October 15. He was terminated December 22 and has not returned to work.

V. Organizing Activities Of Chavez And Canales

Chavez came to the fields on December 23 to talk to the workers, and Alderete told him that because he was no longer working for J & L he would have to check with the office before he could speak.

On December 26 or 27, Chavez and Canales went to the J & L office to see about work and to serve a notice of intention to take access. Neither Lindley nor Johnson were present; they spoke with Alderete. One of them asked about tractor work, Alderete responded that they would have to talk to Lindley. Thereupon Chavez went outside to his car and returned with the "notice" which he served on Alderete. Subsequently, Chavez took access without interference and spoke to the

J & L workers.

Chavez and Canales began organizing at J & L about December 1, 1978. Initially, their efforts consisted of talking to drivers about getting together to have an election. Chavez spoke to them before work and sometimes during the noon break. Canales supported him in these efforts. Chavez also talked to field workers during the course of the harvest.

Chavez testified that sometime between December 18 and 20, Canales, Manuel Sanchez, Yslas and Alvarez signed authorization cards which he gave them. Ayala, Alderete and Alex Muniz were checking machines in the vicinity of the assembled drivers at the time. Neither Chavez nor Canales testified to observing any or all the supervisors watching their activity or the activities of the drivers. Nor is there any testimony that the drivers' conversations could be overheard by the supervisors.

On either the 19th or the 20th, Felipe Arce, a labor contractor used by Respondent, followed Chavez on an occasion when he went to distribute authorization cards to a crew which was "tying up."^{8/}

Chavez distributed authorization cards to the field crews on December 20 or 21. Victor Martinez and Eleodoro Zepeda, a foreman for the labor contractor, were present. No testimony was elicited from Chavez which would tend to establish that his activities were observed by Martinez or Zepeda. I decline to infer Employer knowledge of Chavez' Union activities on this occasion from the mere presence of Martinez and Zepeda in the fields.^{9/}

Lindley denied having knowledge prior to the layoff of an organizing campaign at J & L. He testified he became aware of the campaign after Chavez left the notice at J & L's offices. He denied knowledge of any Union activity by Chavez or Canales prior to the layoff.^{10/} Lindley assumed that Chavez was a UFW member because in April, 1978, Chavez spoke to him about picking lettuce for Bruce Church for a few days while there was no work at J & L.

Ayala admitted he heard rumors during the 1978 harvest that Chavez and Canales were organizing for the UFW.

ANALYSIS AND CONCLUSIONS

Reduced to bare bones, the instant case presents the following situation: the alleged discriminatees engaged in Union or

^{8/}Arce did not testify. Chavez' testimony on this point stands uncontradicted and is credited.

^{9/}It is not completely clear from the record that Martinez was a supervisor at the time.

^{10/}It is uncontroverted that neither Chavez nor Canales discussed the UFW or their interest therein with Lindley.

protected concerted, activity during a period immediately preceding their layoff, credited, testimony establishes Employer knowledge of such activity, thereafter the discriminatees were laid off as part of an economically motivated work force reduction. At issue is whether their selection as among those to be laid off was discriminatorily motivated.^{11/}

It is undisputed, that the December 22 layoff occurred, at the end of the harvest season and that a work force reduction was economically appropriate. Respondent puts forth the following criteria for selecting the tractor drivers to be laid off: length of service, dependability, quality of work and prior service with Phil Johnson's father during the period when Johnson and his father were engaged in a joint farming operation. Respondent's action is suspect with regard to the use of each criteria except service for Johnson's father.^{12/}

Respondent placed, into evidence a document purporting to show the date of hire of each of its tractor drivers. It shows April 5, 1975, as the date of hire for Dan Johnson and August 23, 1976, for Doug Little.^{13/} Both dates appear to establish sufficient length of service to justify the retention of each subsequent to the layoff of December 22, 1978. However, an examination of the evidence leads to the conclusion that Respondent's assertion that date of hire was a basis for layoff selection is of recent contrivance and was not at least so far as Johnson and Little are concerned, a consideration which led to their retention on the job while terminating Chavez and Canales.

Between April 5 and the end of 1975, Johnson worked 213 hours. He next worked for J & L during the very pay period in which Canales and Chavez were laid off. Notwithstanding his lack of employment during the 1978 harvest, he was retained on the payroll and continued to work during 1979. These facts cast substantial doubt on the bona fides of Respondent's explanation that date of hire was a consideration in the retention of drivers. The doubt is intensified when one notes that Respondent's records show a Johnson application for work dated December 1, 1978. The timing of Johnson's hiring vis-a-vis the December 24 layoff supports the conclusion that Respondent's explanation for his retention is pretextual. A more reasonable inference from the facts is that J & L wanted a tractor driver who had not been around during the Union's

^{11/}The fact that a layoff may be justified for economic reasons does not preclude the conclusion that a specific person may have been discriminated against by being laid off. Akitomo Nursery, 3 ALRB No. 73 (1977).

^{12/}No evidence was presented which lends any support for Respondent's assertion that dependability and quality of work were in fact considerations resulting in the selection of those to be laid off. It is apparent that dependability and quality were not considerations affecting selection of the drivers who remained.

^{13/}The record does not establish any family relationship be-

tween Dan Johnson and Phil Johnson.

organizational drive.^{14/}

Further evidence of the pretextual nature of reliance upon date of hire is the employment record of Doug Little. Respondent treats him as having an August 28, 1976, date of hire. He worked during three pay periods in 1976 and did not return to work until, the period ending July 9, 1978. Thereafter he worked intermittently during the balance of the year. There was an unexplained hiatus in his work for Respondent during November and December, 1978. He worked 18 hours in early November and did not return until the pay period ending December 24, 1978. His 18 hours in November was preceded by an additional hiatus of some six weeks between the September 17 pay period and that of November 5. When one notes that his absences were during the harvest period, a time when work is so heavy that even the partners pitch in, one cannot treat seriously a contention that dependability was a consideration entering into J & L's determination of which drivers to lay off. As with Dan Johnson, the lack of continuity of Little's employment by J & L lends no support to Respondent's contention that date of hire was a considered factor in effecting the December 22 layoff.^{15/}

If Respondent's explanation for retaining Manuel Lopez, Anacleto Reyes and Rodrigo Reyes rested solely upon their "dates of hire," their retention would be equally suspect.^{16/} However, Phil Johnson testified credibly that the three were kept on because of his past association with them in connection with his father's operations. Since Respondent was free to pick and choose whom it wished to keep on the payroll, absent an anti-Union motivation, their retention does not evidence a discriminatory motive for the layoff of Chavez and Canales.

If one looks at the 1978 dates of employment of the balance of the regular drivers on the payroll as of December 22, the layoff is consistent with Respondent's contention that length of service was a consideration in selecting those to be laid off. No explanation was offered regarding the basis for retaining Yslas and Sanchez rather than Canales, since each had a March 17 date of hire.^{17/} There is no evidence that either was more dependable or did better worker than Canales.

If Respondent had treated Johnson and Little as new employees when they returned to work in 1978, application of a seniority principle to the layoff would have resulted in both being laid off and in Chavez and Canales being retained. Date of hire as the explanation

^{14/}Respondent makes no claim that Johnson was a former employee of Phil Johnson's father.

^{15/}Respondent asserts in its brief that Little was not among the tractor drivers retained after the layoff. Its records are to the contrary.

^{16/}Respondent asserts in its brief that Anacleto Reyes was on leave of absence as of December 22, 1978. This assertion is contrary to the evidence as found in Respondent's records.

^{17/}The layoff of Ron Grants date of hire listed as July 7, 1977, is explained on the ground that he is a college student.

for retaining Johnson and Little is not believable. No reason, but the need to create the appearance of going by seniority, presents itself for treating Johnson, who had an almost three-year break in service before returning during the very pay period in which the layoff occurred, as a long-time employee. The same may be said for Doug Little who had a break in service of more than 18 months. The conclusion appears inescapable that the selection of Chavez and Canales to be among the drivers laid off was discriminatorily motivated and violative of Sections 1153 (c) and (a). It should be noted that this conclusion is unrelated to and. consistent with Respondent's assertion that the December 22 layoff was occasioned by the end of the grape harvest, i.e., was economically motivated.

We turn now to a consideration of whether the evidence establishes two essential elements of the proof of a violation of Section 1153 (c), i.e. , Union and/or protected concerted activity, and Employer knowledge thereof. Respondent correctly asserts that General Counsel has the burden of proving both elements by a preponderance of the evidence. With respect to "activity," Chavez testified credibly that he and Canales talked to drivers regarding the desirability of an election and that they distributed Union authorization cards to other drivers two or three days before the layoff. Such conduct is consistent with their post-termination activity. Chavez, in the company of Canales, served notice of intent to take access shortly after his layoff and did thereafter visit the fields for organizational purposes. The General Counsel has proved by a preponderance of the evidence that Chavez and Canales engaged in Union and/or protected concerted activity prior to December 22.^{18/}

With respect to the element of Employer knowledge, Lindley testified that as early as April, 1978, he assumed that Chavez was a member of the UFW. Tractor Supervisor Ayala admitted to hearing rumors of organizing activity, and there is no evidence of such activity except that being carried on by Chavez and Canales. Respondent's labor contractor, Arce, followed Chavez on one occasion when he was in the fields signing up workers.^{19/} Chavez, accompanied, by Canales, distributed authorization cards to fellow employees, Ayala and Alderete were in the near vicinity. The credited testimony does not establish a highly visible pattern of Union or protected activity by the discriminatees, but as the Board noted in As-H-Ne Farms, 3 ALRB No. 53 (1977), a discriminatee does not have to be "very active" before employer knowledge of his union activities may be inferred. The protected and/or Union activities of Chavez and Canales having been proved, Respondent's knowledge

^{18/}Chavez' testimony regarding the pre-layoff activities of Canales and. himself was specifically uncorroborated except by Canales. The testimony is credited because of Ayala's "rumors" (infra) and Chavez' later activities.

^{19/}Arce was not called, to rebut Chavez' testimony on this point, nor was any explanation offered, for the failure to call him. A permissible inference, which I make, is that Arce's testimony would not have controverted that of Chavez. At the time Arce was admittedly a labor contractor performing services for J & L, as such he is deemed a J & L supervisor and. his knowledge is imputed to Respondent.

of those activities may be inferred from the evidence cited above as well as from the circumstances surrounding their selection as among the employees to be laid off.^{20/} The fact that each was laid off after having been offered coverage under Respondent's insurance plan also supports the inference of Employer knowledge. Respondent's early December offer, especially as it involved no premium cost to the worker, is only consistent with an expectation the offeree was to continue in employment. Thus, it is reasonable to conclude that prior to commencement of their organizing activities, Canales and Chavez were not scheduled for layoff. It is equally reasonable to infer knowledge of their activities as the reason for Respondent's change of heart vis-a-vis them.

To summarize: Respondent's selection of Chavez and Canales for layoff is inconsistent with proper application of the standards purportedly used for the selection of employees for layoff. Their layoffs can only be explained in terms of Respondent's awareness of their Union activities and a desire to be rid of Union activists and were therefore violative of Sections 1153(c) and (a) of the Act.

The complaint, as amended, also alleges the failure to rehire Chavez and Canales as an independent violation of Section 1153(c). With respect to this allegation, the evidence clearly establishes the post-termination Union activity of Chavez and Canales and Respondent's awareness of their conduct.

The General Counsel contends the Respondent was using seven full-time drivers at the time of hearing and that their utilization manifests the discriminatory intent requisite to establishing a failure to rehire violative of Section 1153(c). I disagree.

The persons claimed by the General Counsel to be full-time drivers are the following: Dan Johnson, A. Reyes, D. Sepulveda, R. Reyes, Angel Muniz, J. Sanchez and Doug Little. Credited testimony establishes Sepulveda as the irrigation foreman at the Poloma property managed by J & L. Utilization of Sepulveda as a tractor driver pending commencement of his duties as the foreman does not evidence a discriminatory refusal to rehire Chavez and Canales. The same is true with respect to the utilization of any other supervisor to drive a tractor during an off period of need for his service as a supervisor, e.g., Victor Martinez.

As noted above, retention of the two Reyes, Muniz and Sanchez after December 22 was not inappropriate, thus their presence on the payroll as of the time of hearing does not support the conclusion urged regarding the failure to rehire Canales and Chavez.

The General Counsel's contention regarding the failure to re-hire Chavez or Canales is not supported by the record. No tractor drivers have been hired, and there is no evidence that the failure to rehire Chavez or Canales is the result of other than the absence of need. The allegations of Paragraph 5(h) are dismissed.

^{20/}S. Kuramura. Inc., 3 ALRB No. 49, at p. 12 (1977).

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Sections 1153(c) and 1153 (a) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully laid off or otherwise terminated the employment of Narciso Canales and Filiberto Chavez, I shall recommend that Respondent be ordered to make Canales and Chavez whole for any loss of earnings and other economic losses suffered as the result of the layoff of December 22, 1978, together with interest thereon at the rate of 7% per annum to be calculated in accordance with the formula used by the National Labor Relations Board, in F. W. Woolworth Co., 90 NLRB 289.

In order to more fully remedy Respondent's unlawful conduct, I shall recommend that Respondent make known to all its current employees and to all employees on its payroll on December 22, 1978, that it has been found in violation of the Agricultural Labor Relations Act, that it has been ordered to make Canales and Chavez whole for any loss of earnings and other economic benefits resulting from its unlawful act, and that it has been ordered, to cease violating the Act and not to engage in future violations.

To this end I shall recommend:

1. That Respondent be ordered to sign the attached Notice and post copies of it at times and places to be determined by the Regional Director. The Notices shall remain posted, for a period of 60 days. Copies of the Notice after translation by the Regional Director into appropriate languages shall be furnished Respondent in sufficient numbers for the purposes described herein.

2. That Respondent be ordered to distribute a copy of the Notice to each of its current employees.

3. That Respondent be ordered to mail copies of the attached Notice, in all appropriate languages, within 31 days of receipt of the Board's order, to all employees on its payroll as of December 22, 1978.

Upon the basis of the entire record, the findings of fact, the conclusions of law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Respondent, its officers, agents, supervisors and representatives shall:

1. Cease and desist from:

- (a) Discriminating against any employee in regard to

rehire or tenure of employment or any term or condition of employment to discourage employee's membership in, or activities on behalf of United Farm Workers of America, or any other labor organization.

(b) In any other way interfering with, restraining or coercing employees in the exercise of their Section 1152 rights.

2. Take the following affirmative actions which will effectuate the purposes of the Act:

(a) Make Narciso Canales whole for any loss of earnings and other economic losses suffered as a result of his layoff on December 22, 1978, together with interest thereon at 7% per annum.

(b) Make Filiberto Chavez whole for any loss of earnings and other economic losses suffered as a result of his layoff on December 22, 1978, together with interest thereon at 7% per annum.

(c) Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records and other records necessary to analyze the amount of back pay due under this Order.

(d) Sign the attached Notice and post copies of it at times and places to be determined by the Regional Director. The Notices shall remain posted for a period of 60 days. Copies of the Notice, after translation by the Regional Director into appropriate languages, shall be furnished by Respondent in sufficient numbers for the purposes described herein. Respondent shall exercise due care to replace any Notice which has been altered, defaced, or removed.

(e) Hand out the attached Notice to all current employees.

(f) Mail copies of the attached Notice in all appropriate Languages, within 31 days after receipt of this Order, to all employees on the payroll as of December 22, 1978.

(g) Arrange for a representative of Respondent or a Board agent to read the attached Notice in appropriate languages to the assembled employees of Respondent on Company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within 31 days from the receipt of this Order, what steps have been taken to

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comply with it. Upon request of the Regional Director, Respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: January 21, 1980.

AGRICULTURAL LABOR RELATIONS BOARD

By

A handwritten signature in dark ink, appearing to read "R. LeProhn", is written over a horizontal line.

Robert LeProhn
Administrative Law Officer

NOTICE TO EMPLOYEES

After a trial at which each side had a chance to present its case, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. The Board has told us to send out and post this Notice.

We will do what the Board, has ordered and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;
2. To form, join or help unions;
3. To bargain as a group and choose whom they want to speak for them;
4. To act together with other workers to try to get a contract or to help or protect one another;
5. To decide not to do any of these things. Because this is true, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

Especially:

WE WILL NOT discriminate against any employee in regard to his or her employment, to discourage union membership, union activity or any other concerted activity by employees for their mutual aid or protection.

WE WILL pay Filiberto Chavez and Narciso Canales any money each may have lost because we laid him off on December 22, 1978.

Dated:

J & L FARMS

By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE OF THE AGRICULTURAL LABOR RELATIONS BOARD, AN AGENCY OF THE STATE OF CALIFORNIA. DO NOT REMOVE OR MUTILATE.